

13, 1961

63356

IN THE PRIVY COUNCIL No. 40 of 1959

O N A P P E A L

FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

ROSETTA COOPER (Plaintiff) Appellant

- and -

10 1. GERALD NEVILL
2. KENYA EUROPEAN HOSPITAL
ASSOCIATION (Defendants) Respondents

CASE FOR THE APPELLANT

1. This is an appeal, pursuant to leave granted P.171,172
by the Court of Appeal for Eastern Africa, from P.172
an order of the said Court of Appeal (Briggs VP., P.170,171
Gould J.A., and Corrie Ag.J.A.) dated 24th
November 1958 reversing in part the judgment of the
Supreme Court of Kenya at Nairobi, Eastern Africa, P.125
(Miles J.) whereby in an action in which the
present Appellant and her husband were respectively
second and first Plaintiffs the Supreme Court
awarded damages to both the present Appellant
and to the first Plaintiff and ordered that the
Respondents should pay -

to the present Appellant shs. 50,000/- P.125
to the present Appellant and to the first
Plaintiff jointly shs. 5,189/80
and to the first Plaintiff alone shs. 1,000

and ordered that the costs of the present Appellant
and the first Plaintiff should be paid by both
30 Respondents.

2. That judgment was reversed by the Court of Appeal for Eastern Africa in the following respects, namely:- (a) the Appeal of the first Respondent to the present appeal was allowed and (b) the appeal of the second Respondents to this Appeal was allowed in so far as the sum of shs.50,000/- damages awarded to the present Appellant was reduced to shs. 15,000/-.

3. The order for costs consequent on the judgment of the said Court of Appeal was that the present first Respondent should have his costs against the present Appellant and the first Plaintiff in the said Court of Appeal and in the Court below (the Supreme Court), certified for two Counsel in the said Court of Appeal and for Queen's Counsel and Junior Counsel in the Court below (the Supreme Court) AND that the present second Respondents should pay to the present Appellant and the first Plaintiff the costs in the Court below (the Supreme Court) such costs to be retaxed, and that in the said Court of Appeal the present Appellant and the first Plaintiff should have their costs as taxed against the present second Respondents save that the present second Respondents were only ordered to pay to the first Plaintiff one half of the of the amount of his costs so taxed and that the present second Respondents should have their costs as taxed against the present Appellant and the first Plaintiff save that the present Appellant should pay such costs to the present second Respondents

4. This Appeal is brought against so much of the order of the said Court of Appeal as ordered that the Appeal of the first Respondent against the judgment and order in favour of the present Appellant be allowed; and that that Respondent should have his costs (as in the said Order certified) against the Appellant and the first Plaintiff in the said Court of Appeal and in the Court below; that the general damages against the second Respondents to the Appellant be reduced from shs.50,000/- to shs.15,000/- and that the Appellant should pay such costs as there directed to the second Respondents.

P.171

P.2 para.3
P.5 para. 1
P.2 para. 4
P.6 para. 1

5. The First Respondent is a surgeon practising in Nairobi in Kenya and the second Respondents manage and maintain the Nairobi European Hospital.

6. On 1st February 1956 the first Respondent for reward operated on the Appellant at the said premises of the second Respondents and with the staff of the second Respondents at those premises, the nature of the operation being repair necessitated by the rupture of an ectopic pregnancy, an abdominal operation. P.2 paras 5 & 6
P.5 para. 1
P.6 para. 1
7. On 1st November 1956 the Appellant was operated on by Mr. Wilfred Carlisle Barber at the European Hospital for the removal of an intestinal obstruction. 10 P.10, 11.
32-37
P.11 passim
8. The intestinal obstruction discovered at the second operation was a piece of material which the Appellant alleges and has alleged was a surgical swab of towelling material. P.11,
11.10-30
9. The Appellant alleges and has alleged that the said swab was left in her body on the occasion of the operation carried out by the first Respondent. P.12,1.38
Ex.2 p.173
P.40, 1.42
to P.41 1.8
10. The Appellant alleges and has alleged that the said swab was left in her body by reason of the negligence of the first and second Respondents and that by reason of such negligence she suffered loss injury pain and damage. 20 P.2 para.7
P.3 para.8
11. On 29th June 1957 the Appellant filed a complaint (Civil Case No. 808 of 1957) as second Plaintiff, her husband being the first Plaintiff in respect of damage separately suffered by him, against both Respondents in the Supreme Court of Kenya, seeking to recover damages for pain and suffering and special damages of Sh.10.858/05. 30 Pp.1 - 4.
12. The special damages were subsequently agreed subject to liability at Sh.5,189/80. P.90 1.16-17
P.122 1.40
13. By her said Complaint the Appellant claimed that in the course of the operation performed by the first Respondent upon the Appellant at the premises of and with the assistance of the servants or agents of the second Respondents on February 1st, 1956, an abdominal swab or pack was left in the body of the Appellant by reason of the negligence of the first Respondent and by reason of the negligence of the servant or servants agent or agents of the second Respondents, 40 P. 2 & 3
para.4-7
inclusive &
P.9 1.30,31
P.3, para.8

and further set out the particulars of her pain and suffering and injuries consequent upon the said negligence.

P.5

14. By his Defence the first Respondent denied that he was negligent, did not admit that any swab was left in the body of the Appellant and did not admit that the Appellant had suffered damage.

15. The first Defendant did not allege that - as was subsequently argued - the swab which was left in the Appellant's body had been left there in the course of a previous operation. Nor although the Plaintiff by his Counsel referred the Supreme Court and the Court of Appeal to Mahon v. Osborne 1939 2 K.B.14, in which such a contingency was alleged to have occurred, did the first Respondent ever suggest or allege against the second Respondents that they their servants or agents had handed to him or his assistant in or for the purpose of the said operation any purported pack which was in fact two packs stuck together in such a manner that the first Defendant and/or his assistant might be excused for not perceiving that they were so stuck together or that one of such adherent packs had remained in the body of the Appellant. 10 20

P.6

16. The second Respondents by their defence denied that they had been negligent and denied that any swab had been left in the body of the Appellant.

P.i & ii.

17. The hearing of the action took place between 27th January and 5th February 1958 and judgment was delivered on 17th February 1958. 30

P.42 11.10-25

P.73, 11.44-46

P.91, 11.17 & 18

P.37, 11.19 - 20

18. At the hearing of the Action the first Respondent agreed that he would be responsible for any failure by his medical assistant Dr. Wilson to remove a swab from the body of the Appellant and for any negligence on the part of Dr. Wilson. Dr. Wilson was not called as a witness, evidence being given that he was in the United Kingdom at the time of the hearing. The concession of the first Respondent by his Counsel in argument identified the first Respondent with the said Dr. Wilson in so far as liability for negligent acts was concerned and would render the first Respondent liable for his assistants and his own 40

misuse of a pack - as by letting go of a mopping pack - as well as for his or his assistants failure to find it when properly used.

19. On 17th February 1958 the learned Judge, Miles J. delivered a reserved judgment in favour of the Appellant and the first Plaintiff holding that the object found by Mr. Barber in the operation performed on the Appellant on 1st November 1956 was an abdominal pack and that it had been left in the Appellant's body at the time of the operation performed by Mr. Nevill.

P.101

Pp.101-105
P.105 1.19-
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20. The learned Judge having considered the following authorities - Van Wyck v. Lewis 1924 App.D.438 (South Africa), Mahon v. Osborne (1939) 2 K.B.14, (1939) 1 All E.R.535, decided, in the submission of the Appellant rightly, that the case where a swab is left in the body of a patient at an operation is one to which the maxim res ipsa loquitur applies but held as the Appellant submits wrongly, that

Pp.105-110

"The view which, so far as my researches go appears to have the weight of authority behind it, is that in a case such as the present, where the Plaintiff alleges negligence on the part of one or other or both of two persons for whom the Defendants are not vicariously liable, the doctrine does not apply. I respectfully agree with the view expressed in Nathan's Medical Negligence at p.114 on this point. The present case, therefore, must be treated as one in which the Plaintiff must establish the negligence which she alleges against the Defendants as in the normal case".

P.108, 1.39

21. The Appellant contends on the contrary:

(a) That the learned Judge on a proper consideration of the authorities should have concluded that where the evidence shows that one or other or both of two persons have injured the plaintiff but the plaintiff cannot show which it was he can call on each of them for an explanation. Baker v. Market Harborough Industrial Co-operative Society (1953) 1 W.L.R. 1472; Roe v. M.O.H. (1954) 2 W.L.R. 915.

P.108

(b) That a fortiori in a case such as the present where the evidence before the court establishes that the injury which the plaintiff has suffered does not normally occur without negligence on the part of both of two or more persons each of such persons must show that it was not his act which caused the injury or that if it was his act or partly his act which caused the injury such act was not negligent - Roe v. M.O.H. (1954) 2 W.L.R. 915.

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The Appellant further contends :

(c) That while the maxim res ipsa loquitur may be said to be a rule of evidence which justifies the plaintiff in calling upon the defendant or defendants for an explanation where he gives evidence of an injury received in circumstances which in the ordinary experience of mankind do not occur without negligence - Scott v. London and St. Katherine Docks Co. (1865) 3 H. & C. 596, the principle properly to be understood from the cases quoted is that where a plaintiff by evidence establishes that the injury he has received has occurred in the course of the exercise by the Defendant of an action requiring a certain skill; and that the normal and careful exercise of such acts by persons having the requisite skill does not involve such injury; the Defendant to avoid a finding that he has failed in his duty of care to the Plaintiff must at least show that the actual events which occurred render it more probable that he was not guilty of negligence than that he was. It is not enough to show either that it is possible that he was not negligent - (Barkway v. South Wales Transport Co. Ltd. (1948) 2 All E.R. 460 at p. 471F and (1950) 1 All E.R. 392 at p. 399H) or that if he exercised all his skill he would not have been negligent.

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P.38, 11.3- 22. The evidence before the learned Judge
6 and 11.21 established that the same type of swab or pack was
-28 used in the said operation both as a "mopping"
P.67, 11.1-2 pack, that is one used in the hand of the surgeon
P.76, 11.30- or his assistant for mopping blood out of the
36 patient's body; and as a "restraining pack", that
P.44, 11.33- is one used to hold clear of the field of operation
35 organs in the abdominal cavity which might

10	<p>otherwise obtrude on the area in which the surgeon was working. The evidence was further as found by the learned Judge that "restraining packs" were attached by tapes to Spencer Wells forceps or clips (a form of forceps with locking jaws) which forceps remained outside the body of the patient both to indicate the presence of such packs and to prevent their being lost or moved, particularly by the natural intestinal movement of the patient's organs, and that 2 or 3 such restraining packs and some 20 mopping packs or swabs were used in the course of the operation performed by the first Respondent. The type of pack employed was of Turkish towelling material approximately 9-10" by 7-8" in size.</p>	<p>P.110, 1.6 - P.111, 1.4 P.26, 11.30-34 P.38, 11.21-26 P.76, 11.40-45 P.83, 11.13-16</p>
20	<p>23. The evidence before the learned Judge established that the object removed from the Appellant's intestines on the occasion of the second operation on 1st November 1956 was such a pack or swab.</p>	<p>P.11, 11.10-20 P.18, 11.28-42 P.25, 1.48 to P.26, 1.30 P.40, 1.42 to P.41, 1.8 P.44, 11.31-27 P.74, 11.14-32 P.76, 11.22-26 P.78, 11.20-37 P.84, 11.4-44 P.87, 1.49-51 P.111, 1.5 to P.112, 1.50</p>
30	<p>24. The learned Judge having considered the system employed for checking the count of the packs and the description of the operation given by the first Respondent and the witnesses for the second Respondents concluded that the pack subsequently found in the Appellant's body was a "restraining pack" and that it was left in the Appellant's body at the operation performed by the first Respondent.</p>	<p>P.117, 1.39 to P.118 1.14 P.105, 11.19-23</p>
40	<p>25. The learned Judge held, having regard to the first Respondent's affirmation that he was not prevented by the circumstances of the operation from making a routine check for packs and having regard to that Respondent's evidence that the intestinal movement had been small, and that he had had adequate assistance, that the first Respondent had failed to make such a search as was reasonable or necessary in the circumstances and that he failed to carry out his routine practice with his usual care and that he had been negligent.</p>	<p>P.116, 11.24-30 and P.118 1.47 to P.119, 1.9 P.118, 1.47 P.119, 11.9 & 10 P.119, 11.20-30</p>

- P.121, 1.7 to 26. The learned Judge also found that the servants
P.122, 1.31 of the second Respondents had been guilty of
P.122, 1.32- negligence, and that the first Respondent and the
37 servants of the second Respondents were equally
to blame.
- Pp.123, 1.10 27. The learned Judge awarded the Appellant
to 124, 1.21 Shs.50,000/- upon the considerations set out in
his judgment.
- Pp.129-133 28. By their Memorandum of Appeal dated 13th May
1958 the Respondents together appealed on the 10
grounds there set out. The first five grounds
were directed to the question canvassed at the
trial before the learned Judge whether the
evidence established, as the learned Judge had
found, that the pack removed from the body of the
Appellant had been left there at the operation
performed by the first Respondent and the
servants or agents of the second Respondents.
29. The remaining grounds of appeal as set out
in the said Memorandum were that there was no 20
evidence to support the findings of negligence or
that such findings were against the weight of the
evidence, and that the Learned Judge misdirected
himself upon the evidence and authorities cited
to him.
30. The Respondents further appealed against the
awards of general damages made by the learned
Judge.
- P.134 to 31. The Judgment of the Court of Appeal for
P.169 Eastern Africa was delivered on 24th November 1958 30
by Briggs V.P. with whose judgment Gould J.A. and
Corrie Ag.J.A. concurred.
- Pp.134 to 32. Having considered the evidence and arguments
141 inclusive the said Court in the said judgment held, in the
submission of the Appellant, correctly in so far
as concerns the question whether the pack was
left in the Appellant's body at the operation on
February 1st 1956, "He (the learned Judge) held
that the onus lay on the plaintiffs, and that the
question must be decided on the balance of 40
probabilities. He found on this basis that the
pack was left in Mrs. Cooper's body at the time
of the second operation.. I think it is open to
us to review that finding as res integra and I
approach the issue on that basis; but I respectfully

agree with the learned trial Judge that the weight of the evidence was sufficient to justify a finding for the Plaintiffs".

10 33. The learned Vice President, in further reviewing that aspect of the case said "In the ordinary swab case there is no disagreement that the swab was left in the body at the one operation to be considered, and the only question in issue is how and why, and whether with or without
20 negligence. In such a case the closest attention must be given by the Defendants and their advisers to the question how the acknowledged mistake arose. In this case that question never attained the same prominence, for the defendants' primary case was that there had been no mistake at all. In that respect they were wrong, and it may be said at once that no explanation of the present of the pack was ever expressly put forward by them. The Court below was left, and we are left, to consider
30 the possibilities which arise from the circumstances and to draw such inferences from the evidence as seem appropriate."

34. The Appellant contends, having regard to the subsequent conclusions of the said Court of Appeal, that, in coming to those conclusions, the said Court paid insufficient attention to its own findings that "the Defendants' primary case was that there had been no mistake at all"; and further contends that in so far as it had been
30 agreed that, as the evidence for both sides was on record, and the question was whether "having regard to their proved acts and omissions and to the circumstances of the operation, (a) the surgeon or (b) a member of the hospital staff had failed in their respective duties to the patient"; it was necessary for the said Court of Appeal to examine the evidence (upon the finding that the swab had been left in the Appellant's body at the operation performed by the first Appellant) from
40 the point of view that that evidence disclosed a state of affairs in which the balance of probabilities was that the first Respondent had been negligent unless the first Respondent could satisfy the said Court of Appeal that the evidence, further, established such facts as would negative negligence on his part; that is to say the said Court of Appeal ought to have applied the test set out in sub paragraph (c) of paragraph 18, supra, beginning with the words "The principle
50 properly to be understood ..."

P.143, 11.1-8

P.143, 1.24
to P.144,
1.17.

35. The Appellant contends that the finding, that evidence of the first Respondent's general skill was admissible, was wrong and further contends that it was wrong to hold that evidence of such general skill could be said to be capable of showing and did show that the first Respondent would be unlikely to leave a pack in the body of the Appellant. The Appellant contends further that, even if such evidence of skill could be relevant to the issue whether or no the pack or swab had been left in her body at the operation performed by the first Respondent, once it were held (as the learned Judge and the said Court of Appeal in fact held) that the pack was left in her body at that operation, the evidence of the first Respondent's skill became irrelevant, since he had in fact left a pack in her body, and should have been ignored by the said Court of Appeal. The learned Vice President and the other members of the said Court of Appeal on the contrary and wrongly, as the Appellant submits, allowed themselves to be influenced alternatively influenced to an excessive degree thereby in reaching the conclusions of fact which they did reach and ergo their decision as to the liability of the first Respondent.

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P.144, 11.15,
16 & 17.

36. The observation of the learned Vice President, "In my view nothing turns on this. No-one questioned Mr. Nevill's general skill in his profession," disclosed a mistake on the part of the learned Vice President since the evidence as to skill ought not to have been admitted if it were not relevant and if it was relevant it was relevant only to an issue decided adversely to the first Respondent. It was wrong for the said Court of Appeal subsequently to draw conclusions of fact which were in part based upon a view of the skill of the first Respondent which was thus irrelevant.

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P.40, 11.31-
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P.42, 1.41
P.43, 11.1-5
P.45, 1.12,13
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37. The learned Vice President having drawn attention to the fact established by the evidence of the first Respondent that the first Respondent was able to carry out his routine check for swabs came to the inconsistent conclusion after reviewing Mahon v. Osborne as reported in (1939) 1 All E.R. 535 (and particularly the passage on page 548)

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P.147, 11.28
29 & 30

that all five of the special circumstances referred to in the quoted passage from the Judgment of Scott L.J. were present. The fifth of those special circumstances was a state of collapse in the patient which (in effect) precluded a routine search. The Appellant contends that upon the evidence the correct conclusion was that the first Respondent had had an opportunity to carry out and had carried out his routine search according to his normal routine and that in view of that Respondent's evidence there was no ground for the qualification of normal routine made by the learned Vice President at page 162 of the Record.

P.150
1. 4,5,6 & 7

P.162, 1.41 to
P.143, 1.1

38. The learned Vice-President formulated the question as to the liability of the first Respondent upon the principles adumbrated by Goddard, L.J. in Mahon v. Osborne (1939) 1 All E.R. 535 at page 561 but misdirected himself in holding that the proper consideration in the present case was limited (in the words used by him) to the question, "On the evidence and in the circumstances was the search for packs made by the first Appellant (now the first Respondent) a proper search or not?" when the true test, in the submission of the Appellant, was and remains whether the first Respondent upon the evidence showed that both he and his assistant, for whom he was responsible, exercised due care in the use of both restraining and mopping packs so as to prevent any of those packs from lodging unseen in the Appellant's body and/or in such a way as to render a search other than a routine search necessary; and whether he the first Respondent exercised due care to search for swabs in such manner and to such degree as was rendered necessary by the previous handling of the packs. The Appellant further says that upon this test if the Appellant or his assistant allowed a restraining pack to come loose unobserved or left a mopping pack used to staunch bleeding unremembered in the Appellant's body that would be negligence which the carrying out of a routine search, which did not reveal such pack, would not excuse. The Appellant further says that in considering what a "proper search" was, the learned Vice President ought to have had regard to the fact found by him that "the unusually large number of packs used at the second operation (that performed by the first Respondent) increased the difficulty of the count and the risk of error", which fact must in the

P.150, 1.36
P.151, 1.18-20

P.140, 11.32-
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nature of the case have been apparent to the first Respondent at that operation and, the Appellant contends, made his duty of reasonable care towards the Appellant a duty to be particularly observant of the location of all packs and a duty to search properly having regard to these particular circumstances.

39. The Appellant further contends that the learned Vice President gave a wrong answer to the question posed by him, for the following reasons:- 10

P.162, 11.18
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(1) He had (as set out in paragraph 34 hereof) already come to a wrong conclusion as to the nature of the 'circumstances'; (i.e.) he had contrary to the evidence that a routine search was in fact made concluded that a routine search was in the normal meaning of the words precluded.

P.150, 11.36
-47

(2) He failed to give sufficient weight to the facts that (a) the pack was in fact left in the Appellant's body notwithstanding the allegedly routine search by the first Respondent; and that (b) the evidence tendered by the first Respondent had been directed to show that the pack had been left in the Appellant's body at a different operation and not to show that if it was left in at the operation performed by him it was so left without his fault and excusably: - having regard to the reliance placed by the learned Vice-President on the words of Goddard L.J. quoted by him at p.150, and in particular to the nature and extent of the explanation required of the surgeon formulated by Goddard L.J., failure fully to consider to what end the first Respondent's evidence was directed led the learned Vice-President to misdirect himself in law as to the effect of the first Respondent's evidence: - and (c) that no adequate evidence was tendered by the first Respondent which would tend to excuse him from being held negligent if the pack had been left in the Appellant's body at the operation performed by him. 20 30 40

P.152, 1.8.

40. The learned Vice-President proceeded to exonerate the first Respondent by finding that, upon the balance of probabilities, the fact was that one of the bundles of packs contained four instead

of three and that in such bundle two swabs adhered together and were counted as one, handed as one to the first Respondent or his assistant, for whom he was responsible, and that in the course of use as a mopping swab one of the two adherent swabs became detached from the other in the body of the Appellant.

10 41. The learned Vice-President said, in coming to that conclusion that that hypothesis was most consistent with the facts proved stated, "From this I think it may be said that it is more likely that the incoming count was wrong than the outgoing and that the only probable source of error disclosed in the evidence is that one of the bundles contained now three but four packs. The nursing staff witnesses were cross-examined as to this possibility". This latter observation was erroneous in that the nursing staff witnesses were never so cross-examined. There were only two passages in the evidence at which any mention of the incoming packs arose in connection with the count, namely:

20 (1) Patricia Ann Grant-Smith in answer to counsel for the first Respondent stated that if she came across a bundle of packs with more than three packs she would discard it. Furthermore the whole tenour of the examination of the said witness by the said counsel was not directed to establishing the theory adumbrated by the learned Vice-President but to establishing, on the contrary, that the pack could not have been left in the Appellant's body on the occasion of the operation performed by the first Respondent. There was no cross-examination of this witness on this point by counsel for the Appellant.

P.79, 11.10,
11, 12

30 (2) Pamela Dassie Banks stated in chief, while explaining the system employed by the second Respondents (with a view to establishing that the pack was not left in the body of the Appellant at this operation), that she had "never come across a bundle containing more than three packs or a pack with no tape. It would be considered a very serious matter if I were to."

P.81, 11.34-37
inclusive

40 42. The only place where the question of four packs being in one bundle was considered was in the

P.96, 11.36
37 & 38 final address of Counsel for the Appellant to the learned Judge in which the question of the outgoing count (i.e. of used and dirty swabs) was raised in the words, "If mistake arose by having one group of four count at end of operation, relevance of final count would be very small."

P.155, 11.37
-40 43. The learned Vice-President in reaching the conclusion which he did observed "(vi) these packs were made of Turkish towelling, were used and laundered repeatedly, and presumably would grow thin with long use."

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P.11, 1.15-
28 44. There was no evidence before the Court to show whether packs did become thin in use and whether, and if so at what stage, packs were discarded on becoming thin or after having been used a given number of times. The evidence of the witness who saw the pack which was removed from the intestines of the Appellant on the occasion of the operation in November 1956 is silent as to the pack being old or thin.

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P.78 1.22-
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1.34
P.84 1.20-
1.22
P.31 - 1.40
P.87 1.49-
1.51

45. The Appellant says that the learned Vice-President misdirected himself (as did the other members of the Court who delivered concurring judgments) in finding as he did according to the theory he had adumbrated:

(i) when it was wholly unsupported by any evidence;

(ii) when it was against the weight of the evidence;

(iii) when it had never formed part of the case of any of the parties notwithstanding that counsel for the first Respondent cited Mahon v. Osborne to the learned Judge and to the Court of Appeal in which case a similar suggestion was canvassed;

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(iv) when, if the said theory were correct the Court ought (which it did not) to have considered the question whether a surgeon ought to have felt that the pack handed to him was thicker (possibly much thicker) than a normal pack and that it was in fact two

packs and whether it would be negligence on the part of the surgeon to fail to observe such a fact and to fail to have rejected such a pack or packs;

10 (v) when if the said theory were correct as to the coming into the hands of the first Respondent of two packs as one, the learned Vice-President failed to consider correctly the necessary implication that it was contrary to the balance of probabilities that one such pack could become detached from the other, unless the first Respondent let go of the pack or packs which would have been negligent except in the case of a mopping pack deliberately released to staunch the flow of blood which ought to have been remembered whereafter a proper search for such pack ought to have revealed it and any pack adherent to it;

20 (vi) the said theory was adopted in spite of its speculative nature expressed in the terms used by the learned Vice-President namely:

P.156 l.50 to
P.157 l.16

30 "I appreciate that much of this is speculation; but on the evidence I think it could have occurred and, if the inherent probability of the coincidence of independent causes is borne in mind, I think it is a more probable, or less improbable, hypothesis than that put forward by the learned Judge, or any other I can think of. The learned Judge did not consider this possibility at all. If he had, he might not have found, as he did, that, if this was a mopping pack, negligence by one of the surgeons was established beyond doubt. I give my own opinion at once that, if the two mistakes arose in the way I have indicated, it is doubtful whether Sister Banks personally was guilty of negligence, and the surgeon who received and lost the pack, whichever of them
40 it was, was definitely not guilty of negligence in losing control of it. I defer consideration of the search."

(vii) when if the facts were as found by him, they were facts "especially within the knowledge of" the Respondents within the meaning of Section 106 of the Indian Evidence Act 1872 which enacts that the burden of proving such facts is upon the person in whose special knowledge

they are, and when not only had the Respondents not discharged such burden but had set out to prove a different case, i.e. that no such thing occurred.

The Indian Evidence Act 1872, as amended, forms part of the Law of Kenya as provided by the Laws of Kenya (revised 1948) Ch.12.

(viii) When the Court was limited as to the facts which it could find by S.114 of the Indian Evidence Act 1872, which provides, "the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case", and when the learned Vice-President had qualified the finding which he made in the passage above quoted as, "speculation", and as a "less improbable hypothesis", which qualifications fall far short of the degree of certainty required of the Court by the words, " which it thinks likely to have happened".

46. The said inherent improbability to which the learned Vice-President referred in the passage quoted in paragraph 45 (vi) supra was postulated by him in the words,

P.152, 1.8 to
P.153, 1.7

"Speculation is often unprofitable, but I think it is useful in this case to consider some of the ways, whether more or less improbable, in which the mistake may have arisen.. There are in this case two matters to be explained, each unusual and exceptional in itself, the surgeon's failure to find the pack, and the nursing sister's wrong count. The odds against each of these occurrences at any operation are long, and the odds against both occurring at the same operation through unrelated causes must be mathematically so great that one is tempted to seek an explanation on the basis of a single cause producing both results. If such an explanation can be found, the hypothesis would appear to be inherently more probable than any based on unrelated causes. The learned Judge's view of the probabilities seems to me on this basis to be open to

criticism. Only two or three restraining packs were used, that is, the small number normal in any ordinary abdominal case, and they were used with forceps attached. It must be assumed, on the learned Judge's hypothesis, (a) that a forceps fell off unnoticed, (b) that Mr. Nevill miscounted the two or three restraining packs, which it was second-nature to him to memorize, and which he said were all in clear view and (c) that the miscount by the sister was due to some other unrelated cause. On the other hand about twenty mopping packs were used, some of them perhaps more than once, in an abdomen full of blood. No Spencer-Wells clips were used on the mopping packs, and this was proved to be good surgical practice, although some surgeons use them for some operations. The surgeon did not keep a mental count of the mopping packs, and it was proved that it was not his duty to do so. The mopping was done at the highest possible speed, for it was essential to clear the operational area and sew up the ruptured uterus as soon as possible. The learned Judge states that it would have been improper procedure for Mr. Nevill or Dr. Wilson to release his hold on a mopping pack. Mr. Omerod's and Mr. Baimbridge's evidence shows that this may not have been a rule of universal application; but that may for the moment be disregarded. The learned Judge concludes that, if a mopping pack was left in the body of Mr. Nevill, either personally or vicariously through Dr. Wilson, must have been negligent by releasing his hold on it. I think this was an incorrect assumption on which the whole case against the first appellant may turn".

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47. The "inherent improbability" in the learned Judge's findings so described by the learned Vice-President:

- (a) in so far as it consisted of the surgeon's failure to find the pack and the nursing sister's wrong count was an example of two coincidental occurrences which must occur in every case in which a swab or pack is left in a patient without the knowledge of surgeon or nursing staff and the Appellant refers to

Mahon v. Osborne (1939) 2 K.B.14 and (1939) 1 All E.R. 537 and to Urry v. Bierer (Times Newspaper March 16th 1955), cases which were referred to in the said Court of Appeal, as examples of such cases;

(b) ignored or paid insufficient attention to the logical consequences of the learned Judge's acceptance of the first Respondent's evidence that neither he nor his assistant had let go of any mopping pack and that in the operation performed on the Appellant it would not have been necessary to let go of such a pack. As the findings of the learned Judge and of the said Court of Appeal inevitably involved coming to the conclusion that the pack in the Appellant's body was a mopping or restraining pack used in the operation performed by the first Respondent it was necessary to find, if it was not a mopping pack that it was a restraining pack. 10

D.W.4
P.57, 11.26-40
48. If the pack subsequently found in the Appellant's body was a restraining pack it could not upon the evidence have been left in the body of the Appellant without the negligence of the first Respondent or his assistant for whom he was responsible. The learned Vice-President mis-directed himself in that he paid insufficient attention to the evidence of Edward Ronald Omerod that the forceps holding a restraining pack could become detached and that it would be possible to fail to observe that forceps had become detached. 30

49. The Appellant says that that evidence supported the conclusion of the learned Judge as to what occurred and that if the first Respondent failed to observe that it had occurred or failed to keep a proper count of the restraining packs in such a way as to know that a pack was missing, such failure would be negligence on the part of the first Respondent or on the part of his assistant for whom he was responsible. 40

50. If the said pack was a mopping pack it could not have been left in the body of the Appellant without having left the hand of the first Respondent or of his assistant for whom he was responsible. Save as indicated below, to let go

of a mopping swab would in the submission of the Appellant be negligent in the absence of proof of some state of affairs such as was assumed by the learned Vice-President.

P.38 11.6-11
P.42 1.13 to
1.32

10 51. If as held by the said Court of Appeal the pack was a mopping pack then that Court in holding "The surgeon did not keep a mental count of the mopping packs, and it was proved that it was not his duty to do so", ignored the fact which they then ought to have considered whether a mopping pack had in fact been used to staunch the flow of blood in which case the surgeon, according to the first Respondent's witness Mr. Baimbridge (D.W.6) ought to have kept a mental note of it. If the first Respondent had used a mopping swab in such a way it would have been negligent of him to have forgotten its position and existence but that forgetfulness would be consistent with his honestly deposing as he did depose that no mopping
20 swab had left his hand.

D.W.6.
P.66 1.40-
P.67 1.44

52. The learned Vice-President paid insufficient attention to the fact that the only evidence on the question whether Dr. Wilson had let go of a mopping swab was given by the first Appellant and was limited to ,

30 "I cannot say that a mopping swab never left my assistant's hand. It would be an improper thing to happen as a general rule. In this operation it would not have been necessary. I never observed Dr. Wilson letting go of a mopping swab. I knew where I had put the two or three packs. I only keep count of packing swabs. It would be quite impossible in an operation of this sort to keep count of mopping swabs. The packing swabs were put in this case either by me or my assistant."

P.42,11.11-
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40 53. The learned Vice-President in concluding that the incoming count of packs was wrong misdirected himself in that he overlooked the fact that his conclusion involved finding the commission by the hospital staff of the same error of counting on four different occasions :-

(i) when the packs were stored in bundles

P.153, 1.12

- (ii) at the time of sterilization
- (iii) at the time of laying out the packs on the trolley
- (iv) at the time of handing the pack to the surgeon,

which was less likely to happen than the two coincidental mistakes of the surgeon and sister common to every occasion, when a swab is left unwittingly in the patient.

D.W.7	54. The learned Vice-President, further mis-	10
P.74, 11.43-	directed himself in that he paid no or no	
44	sufficient attention to the positive evidence of	
P.75, 11.1-2	Mary Mackenzie Molloy that no bundle of packs	
P.76, 1.20	had ever contained 4 or 5 packs to her knowledge,	
to 1.50	which evidence was adopted as part of the first	
P.73, 11.40-	Respondent's case or to the positive evidence	
43	of Patricia Ann Grant-Smith that she had never	
D.W.8	come across a bundle containing more than three	
P.78, 11.44	packs (on which she was not cross-examined on	
& 45	behalf of the first Respondent) or to the positive	20
D.W.9	evidence of Pamela Dassie Banks that while taking	
P.81, 11.34	an operation she had never come across a bundle	
-36	containing more than three packs (upon which	
Pp.85 & 86	evidence she was not cross-examined by counsel	
	on behalf of the first Respondent). The learned	
	Vice-President ought to have directed himself	
	that in the light of that evidence and of the	
	failure of the first Respondent's counsel to	
	cross-examine thereon and in the light of the	
	total absence of any evidence to the contrary it	30
	was not open to him to assume that the possibility	
	of a bundle containing 4 packs existed and to	
	assume that in fact such a bundle had in fact	
	probably been brought into the theatre at this	
	operation. A fortiori it was not open to the	
	learned Vice-President to find that such a	
	sequence of events was "likely" within the	
	meaning of S.114 of the Indian Evidence Act 1872.	

P.162 1.29-	55. The learned Vice-President in considering the	40
P.163, 1.6	extent of the search made by the first Respondent	
	placed excessive emphasis on the duty to search	
	and paid insufficient regard to the implications	
	of all the evidence that the first Respondent	
	would be and in the submission of the Appellant	
	was negligent for the reasons above stated in	
	leaving a swab which required to be searched for	

in the body of the Appellant.

10 56. If the learned Vice-President was right in holding that "Mr. Nevill gave a proper account of the circumstances and conduct of the operation which was accepted as true and which showed that the mishap was not due to negligence on his part", he misdirected himself in not considering whether the first Respondent had given such an account as regards his assistant Dr. Wilson and he ought to have come to the conclusion that in that respect no satisfactory explanation had been given. P.163
1.24 - 1.38

57. Such a finding was further inconsistent with the finding that "it may be said at once that no explanation of the presence of the pack was ever expressly put forward by them (the Respondents)". P.142
11.39-41

20 58. The Appellant contends further that the finding that the servants of the second Respondents were negligent was right, if the judgment of the said Court of Appeal be upheld for the reasons there stated or, if as the Appellant prays, the judgment of the said Court of Appeal be set aside and the judgment of the learned Judge restored, for the reasons given by the learned Judge.

30 59. The Appellant further contends that the assessment of damages at Shs.50,000/- by the learned Judge was right and that no grounds were shown for reducing it. The said Court of Appeal did not dissent from the considerations expressed by the learned Judge in reviewing the damages awarded. P.166, 167

40 60. The Appellant further contends that the said Court of Appeal in reducing the damages awarded to the Appellant paid insufficient attention to the period of pain and suffering of the Appellant and particularly to the acute anxiety suffered by her, to the belief that she had cancer which belief was not criticised or questioned, to the intensity of the pain which induced that belief and to the fact that the intensity of the pain suffered by the Appellant led her to take steps to commit suicide. Pp. 28 & 29
P.132, 1.10
to P.124, 1.19
P.166, 1.19
to P.167, 1.35

61. The Appellant further contends that if the damages awarded by the learned Judge were properly to be reduced the figure of Sh.15,000/- P.168, 1.41

was a wholly erroneous and excessively low estimate of the damage suffered by the Appellant.

P.168, 11.30-
36 62. The Appellant further contends that the said Court of Appeal paid undue attention, in assessing the damages, to the decision of Pearson J. in Urry v. Bierer (Times Newspaper 16th March 1955) in which he awarded the Plaintiff £3,000 damages for personal injuries caused by leaving a swab in her body in the course of an operation. The Appellant says that while that case gave a rough guide as to the level of damages appropriate to such a case, the report was insufficiently detailed for the said Court of Appeal adequately to compare the extent of the present Appellant's damage with the damage suffered by the Plaintiff in that case and then to conclude that the present Appellant had suffered less and ought to be awarded less. The Appellant further says that even if the report of Urry v. Bierer had been more detailed it would be wrong in principle for the said Court of Appeal to consider the amount awarded as in any way a precise guide.

P.24, 1.29-
36 P.124, 1.1-5
P.167, 11.15
-19 63. The Appellant further says that according to the said Report of Urry v. Bierer the learned Judge in that case awarded the sum of £3,000 damages in circumstances of which he said that "It was not too much to expect that in future (the Plaintiff) would be as happy and healthy as if she had not suffered the misfortune", (The Times Newspaper March 16th 1955, p.11. Col.3) and that accordingly having regard to the fact that in the Appellant's case the prognosis of her future was less favourable and that, as found by the learned Judge, the pain from adhesions might last the rest of her life, the said Court of Appeal if they rightly considered the case of Urry v. Bierer as a guide could not rightly have reduced the damages of Shs.50,000/- awarded by the learned Judge and must be held to have erred in so doing.

64. The Appellant accordingly prays that the award of damages made by the learned Judge may be restored.

65. The Appellant further says that the order for costs made by the said Court of Appeal was wrong and that if the finding of the said Court of

Appeal was wrong and that if the finding of the said Court of Appeal were right as to liability the right order for that Court to have made in respect of costs was that the second Respondents to this Appeal should pay the costs of the Appellant and the other Plaintiff in the Court below together with the costs ordered to be paid by those parties to the first Respondent to this Appeal and that a similar order should have been made in respect of the costs in the said Court of Appeal having regard to the facts that :-

- (i) upon the substantive issue of liability the second Respondents there failed, and
- (ii) that the Appellant, in the premises, bringing her action against two parties the acts of one or other or both of which caused her damage while she was unconscious, was right in joining both Respondents as Defendants. The Appellant refers further to Urry v. Bierer (March 16th 1955, Times Newspaper, page 11, Col. 3) as indicating that in such a case it is likely that both surgeon and nursing staff will be equally to blame but avers having regard to the finding of the jury in Mahon v. Osborne (1939) 2 K.B.14 that it is proper in such a case as the present to sue both the surgeon and the hospital authority responsible for the nursing staff.

The Appellant further says that she ought to have the costs of this appeal and the costs in the said Court of Appeal and the costs of the trial of the action.

66. The Appellant submits that the order of the said Court of Appeal ought to be set aside or varied and the order of the learned Judge in the Court below restored and that she should have the costs of this appeal and the costs of the appeal to the said Court of Appeal, for the following (amongst other)

R E A S O N S

- (1) BECAUSE the evidence established that a pack had been left in the body of the Appellant in the course of the operation

performed by the first Respondent with the assistance of the servants of the second Respondents.

- (2) BECAUSE the evidence did not exonerate the first Respondent or the second Respondents from the conclusion that the pack was so left as a result of the negligence of the first Respondent and the servants of the second Respondents.
- (3) BECAUSE the Supreme Court of Kenya was right in finding that the Respondents were guilty of negligence towards the Appellant and in awarding the Appellant damages of Shs.50,000/- and costs. 10
- (4) BECAUSE the Court of Appeal for Eastern Africa were wrong in allowing the appeal of the first Respondent from the judgment of the Supreme Court of Kenya on grounds not supported by the evidence.
- (5) BECAUSE the said Court of Appeal were wrong in allowing the said appeal on grounds dependent upon a finding of fact not alleged by the Respondents or either of them nor canvassed by any party in argument. 20
- (6) BECAUSE the said Court of Appeal failed properly to consider the burden of proof imposed upon the parties, particularly the first Respondent, (a) generally, (b) more particularly in the light of the facts actually proved to have occurred. 30
- (7) BECAUSE the said Court of Appeal failed to consider fully whether the first Respondent had discharged the burden of showing in the events which occurred that his assistant was not negligent alternatively, if the said Court of Appeal did fully consider the question, its conclusion was wrong.
- (8) BECAUSE the said Court of Appeal failed to hold as it should have done that upon the evidence the first Respondent and his assistant or one or other of them had been negligent. 40

- (9) BECAUSE the said Court of Appeal ignored the principle of the decisions in Baker v. Market Harborough Industrial Co-operative Society (1953) 1 W.L.R. 1472 and Roe v. M.O.H. (1954) 2 W.L.R. 915, that where the evidence shows that one or other or both of two persons have injured the Plaintiff but the Plaintiff cannot show which it was he can call on each of them for an explanation.
- 10 (10) BECAUSE the said Court of Appeal failed properly to consider the effect on the burden of proof in the action of and to apply Section 106 of the Indian Evidence Act 1872 which is part of the Law of Kenya.
- (11) BECAUSE the said Court of Appeal failed properly to consider whether it could find as it did having regard to the provisions of Section 114 of the Indian Evidence Act 1872 which is part of the Law of Kenya.
- 20 (12) BECAUSE the said Court of Appeal was wrong in finding as it did having regard to the provisions of Section 114 of the Indian Evidence Act 1872 which is part of the Law of Kenya.
- (13) BECAUSE the said Court of Appeal was wrong in not ignoring the evidence before it of the first Respondent's skill as a surgeon which was irrelevant to the question whether he had in fact exercised that skill in the operation
- 30 which he performed on the Appellant.
- (14) BECAUSE the said Court of Appeal misdirected itself by paying insufficient attention when drawing conclusions of fact to the adoption by the first Respondent of the evidence of the second Respondents' witness Molloy.
- (15) BECAUSE the said Court of Appeal applied a wrong standard in assessing and reducing the damages awarded to the Appellant.
- 40 (16) BECAUSE for these reasons and by reason also of the matters hereinbefore set out in the Case the Court of appeal for Eastern Africa

was wrong :-

- (i) in allowing the appeal of the first Respondent and holding that neither he nor his assistant for whom he was responsible were negligent towards the Appellant:
- (ii) in reducing the damages awarded to the Appellant, and
- (iii) in making an Order for costs unfavourable to the Appellant.

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ADRIAN HEAD

IN THE PRIVY COUNCIL No. 40 of 1959

O N A P P E A L

FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

ROSETTA COOPER (Plaintiff) Appellant

- and -

1. GERALD NEVILL
2. KENYA EUROPEAN HOSPITAL
ASSOCIATION (Defendants)

Respondents

CASE FOR THE APPELLANT

MERRIMAN WHITE & CO.,
3, King's Bench Walk,
Temple, E.C.4.

Solicitors for the Appellant